IN THE

Supreme Court of the United States

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION AND EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, AND GEORGE O. CORY, as members of said Commission,
Petitioners,

v.

CONTINENTAL AIR LINES, INC., *Respondent.*

No. 492

MARLON D. GREEN, *Petitioner,*

v.

CONTINENTAL AIR LINES, INC., *Respondent.*

ON WRITS OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Supreme Court of Colorado (R. 288-309) is reported at 368 P.2d 970. The opinion has not yet been reported in the official state reports.

JURISDICTION

The judgment of the Supreme Court of Colorado was entered on February 13, 1962 (R. 310). Timely petitions for rehearing were filed by petitioners herein on February 21, 1962 (Colorado Anti-Discrimination Commission) (R. 311) and February 28, 1962 (Marlon D. Green) (R. 313). The original opinion of the court below was modified on rehearing and, as modified, adhered to by order of court dated March 5, 1962 (R. 314). Petitions for writs of certiorari were filed by Green on April 30, 1962 and by the Commission on May 26, 1962. Both petitions were granted and the cases consolidated on October 8, 1962 (R. 314-315). The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. § 1257(3) upon allegations that the validity of a state statute is drawn into question on the grounds of repugnancy to the Constitution of the United States (Comm. Brief 2; Green Brief 3). Continental submits that this Court lacks jurisdiction under 28 U.S.C. § 1257(3) because the opinion of the court below rests upon an adequate and independent non-federal ground.

QUESTIONS PRESENTED

1. Whether the decision below rests upon an adequate and independent non-federal ground where, in addition to discussion of federal questions by the Supreme Court of Colorado, that court (1) affirmed the decision of the trial court without reservation and approved the trial court's findings and conclusions, and (2) the decision of the trial court specifically held ". . . that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce."

2. Whether application of the Colorado Anti-Discrimination Act of 1957 to the flight crew personnel of an interstate air carrier is barred by Article I, Section 8 of the United States Constitution as an undue burden on commerce?

3. Whether either the Civil Aeronautics Act (now the Federal Aviation Act) or the Railway Labor Act prohibit racial distinctions by interstate air carriers as to flight crew personnel engaged in interstate operations and pre-empt that field, thereby precluding application of the Colorado Anti-Discrimination Act of 1957.

STATUTES INVOLVED

The pertinent constitutional and statutory provisions are as follows:

1. Constitution of the United States, Article I, Section 8, Clause 3:

> "The Congress shall have Power . . .
>
> • • • • •
>
> "(3) To regulate Commerce with foreign Nations, and among the several States, . . ."

2. Civil Aeronautics Act of 1938, § 404(b), 52 Stat. 993 (1938), 49 U.S.C. § 484(b) (1952):

> "(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air

transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

3. Civil Aeronautics Act of 1938, § 1007, 52 Stat. 1025 (1938), as amended, 54 Stat. 1235 (1940), 49 U.S.C. § 647 (1952):

"(a) If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board, its duly authorized agent, or, in the case of a violation of section 481(a) of this title, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of said provision, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of said provision or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto.

"(b) Upon the request of the Board, it shall be the duty of any district attorney of the United States to whom the Board may apply to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this chapter or any rule, regulation, requirement, or order thereunder;

or any term, condition, or limitation of any certificate or permit, and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States."

4. Additional provisions of the Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), as amended, 49 U.S.C. §§ 401-722 (1952), certain provisions of the Federal Aviation Act of 1958, 72 Stat. 737 (1958), 49 U.S.C. §§ 1301-1542 (1958), and of the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-188 (1958) are referred to in the argument and are cited or set forth therein.

STATEMENT OF THE CASE

The proceedings which bring the instant case to this Court were commenced when Marlon D. Green ("Green") filed a complaint against Continental Air Lines, Inc., ("Continental") with the Colorado Anti-Discrimination Commission ("Commission") (R. 1). The Commission, an administrative agency of the State of Colorado, derives its powers and duties from the Colorado Anti-Discrimination Act of 1957 ("Colorado Act"), 1953 Colo. Rev. Stat. §§ 80-24-1 through 80-24-8 (1960 Perm. Supp.).

While denying generally the material allegations contained in Green's complaint, Continental additionally asserted in its answer that the United States had pre-empted and reserved to its exclusive regulation and control the operations of interstate air carriers and that application of the Colorado Act to such a carrier constituted an undue burden on interstate commerce in violation of Article I,

Section 8, of the Constitution of the United States (R. 6). The Commission conducted a hearing on Green's complaint (R. 7-222) and, some seven and a half months later, purported to enter findings, conclusions and orders adverse to Continental (R. 223-227).

In accordance with 1953 Colo. Rev. Stat. § 80-24-8 (1960 Perm. Supp.), which provides for judicial review of orders entered by the Commission, Continental filed its complaint and petition for review in the State District Court in Denver, Colorado (R. 227-235). Upon hearing in the District Court, the case was remanded to the Commission for additional findings on specified matters relating to the interstate commerce issues. The Commission instead attempted to withdraw its initial order and substituted new findings and conclusions. These procedural irregularities led to dismissal of the action in the District Court and initial review by the Supreme Court of Colorado. *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P.2d 83 (1960). The Supreme Court of Colorado held that the Commission's action in substituting orders was improper, and returned the case to the Denver District Court with instructions to pass upon the merits of Continental's complaint against the initial Commission order.

Although not germane to the issues as to which certiorari has been granted by this Court, petitioners, in their respective statements of the case, have treated at some length miscellaneous factual matters submitted to, but not decided by, the courts below. A resume of the matters actually raised below will, it is believed, assist in delineating the issues before this Court.

Continental's complaint and petition for review in the Denver District Court stated six separate claims for relief. The first and second claims, as noted above, dealt with the applicability of the Colorado Act to Continental's cockpit personnel. Continental's third claim asserted that the Commission's findings were without evidentiary support and, further, that certain evidence was improperly received; its fourth claim attacked the Commission's refusal to permit Green's voluntary withdrawal of his complaint prior to any decision by the Commission; and its fifth and sixth claims were directed against a number of significant irregularities in the Commission's conduct of the hearing and post-hearing procedures in this matter (R. 228-235). Petitioners' statements of the case stress only the evidence deemed by them material to the third claim for relief; no reference is made to the substantial issues involving Green's withdrawal of his complaint and the failure of the Commission to follow prescribed rules of procedure.

Continental vigorously challenged the sufficiency of the evidence upon which the Commission's findings were based. It was not disputed that Continental interviewed 14 pilot applicants in June 1957, of whom six, including Green, were found qualified to undergo the Company's flight training program. Of the six found to be so qualified, four were enrolled in the July training class. The names of Green and the sixth man were retained as qualified applicants eligible for employment (R. 103) and Green was so advised (R. 52). His name was withdrawn from Continental's list of qualified applicants only after it was learned that he had embarked upon a series of suits against other employers.[1] Continental believed that in-

[1] See opinion of the trial court (R. 260).

volvement in such other proceedings would have materially hindered his flight training. Moreover, because of the importance to its business of the impression of stability conveyed by its pilots, it was Continental's policy not to hire, or to retain, pilots who became involved in public controversy (R. 103-104, 114-115).

The only evidence which arguably could be said to support Green's complaint came from agents of the Commission who testified as to conversations with a Continental vice president. During one of these conversations the Continental representative, speaking as an individual, mentioned certain possible adverse effects which could be occasioned by the employment of a Negro pilot by any airline. Continental, while denying that these statements indicated a discriminatory purpose, asserted that they had been made during an attempted conciliation and compromise and were privileged and thus inadmissible, both by agreement and by statute (R. 231).

In addition to its attack on the jurisdiction of the Commission over these proceedings, Continental raised serious constitutional objections to the manner in which the hearing and post-hearing procedures were conducted (R. 233-234). Although Green's complaint was set for hearing before the entire Commission sitting as hearing examiners, the actual proceedings were conducted before varying groups of commissioners. Only five of the seven commissioners were present at any time during the first day of the hearing, only three commissioners were present at any time during the second day of the hearing, and only two of the commissioners were present during the entire proceedings. One of the commissioners attended only the

hearing session during which Green testified on direct examination (R. 41). Although the Commission's own rules and regulations require the hearing examiners to submit findings of fact and the basis therefor to the Commission, no such findings were made in this case. Instead, the entire Commission, including those members who were never present as well as those who attended only portions of the hearing, purported to make credibility evaluations and enter findings of fact and conclusions.

The hearing on Green's complaint was held on May 7 and 8, 1958. Neither the Commission itself nor any commissioner filed a complaint in this case as they are permitted to do under the Act. 1953 Colo. Rev. Stat. § 80-24-7 (1) (1960 Perm. Supp.). The only matter before the Commission was the complaint of Green, a private individual.

On December 14, 1958, before the Commission had entered an order of any kind with respect to Green's complaint, Green sent the following telegram to the Commission with a copy to Continental:

> "Urgently request withdrawal of my complaint against Continental Air Lines. Signed, Marlon D. Green." (R. 235, 236).

Notwithstanding this emphatic telegram, the Commission, on December 19, 1958, entered its initial decision in which it stated, without giving any reason, that the hearing examiners refused to consent to the withdrawal and pursuant to which Green was given an option to take advantage of the order against Continental (R. 225-226). He subsequently elected to do so.

The validity of the regulation by which the Commission attempted to limit Green's right to withdraw his complaint, and the action of the hearing examiners in withholding consent to such withdrawal, were briefed and argued at length in both the Denver District Court and the Supreme Court of Colorado. It was and is Continental's position that the regulation which attempted to limit the withdrawal of Green's private complaint, as distinguished from a complaint filed by the Commission, is in derogation of the statutory purpose to resolve by conciliation or settlement private disputes pertaining to racial or religious matters, and is therefore beyond the power of the Commission to adopt and hence invalid. It is Continental's further position that the action of those unidentified hearing examiners who refused to consent to the withdrawal was equally inconsistent with the purpose of the Act and improper.

It was in this posture that the action came on for review on the merits by the Denver District Court. Because that court concluded that Continental's jurisdictional claims were determinative, it did not reach the several other bases on which relief was sought. The trial court, in an extensive opinion, first examined the statute and found that "the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce" (R. 260). It then found, based upon a court-approved stipulation (R. 256), that Continental is a commercial carrier by air operating under a certificate of public convenience and necessity issued by the Civil Aeronautics Board, that Continental transports passengers, freight, and United States mail between the states of Colorado, California, Illinois, Kansas, Missouri, New Mexico, Oklahoma and Texas, and that the pilot position

sought by Green involved interstate operations (R. 260-261). The trial court recognized that one of the salient elements of interstate transportation was its routine and frequent multi-state contacts (R. 269). Thereafter, it further found that the Colorado Act could not constitutionally be extended to cover flight crew personnel of interstate air carriers (R. 285). Based on these findings and conclusions it set aside the findings of the Commission and dismissed the complaint (R. 285). The Supreme Court of Colorado, on writ of error, reviewed the decision of the District Court, and, *inter alia*, held that "The only question resolved [by the trial court] was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment was based exclusively on that ground." (R. 293). Having thus interpreted the decision of the court below, it affirmed that decision, not only as to the result but also as to the District Court's findings and conclusions (R. 293). In so doing the Supreme Court of Colorado also affirmed the District Court's findings and conclusions that the Colorado Act could not constitutionally be applied in this case under established rules of preemption and burden on interstate commerce.

Thus the issue is not whether Colorado has the general power to pass an anti-discrimination law. Such contention has not been made by Continental. The only orders in this case relate specifically to flight crew personnel of an interstate air carrier, and the issue which has been ruled upon is whether the Colorado Act is applicable to such persons.

The Supreme Court of Colorado noted that other issues remain in the case when it stated:

> "If the question [whether the Colorado statute may be applied to flight crew personnel of an interstate air carrier] is answered in the negative other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by provisions of the Colorado Constitution are academic and of no materiality to the issue to be determined." (R. 293)

Continental's position with respect to these matters has been indicated above. Such other issues involve important substantive and procedural questions which have not been ruled upon at any time by any court.

SUMMARY OF THE ARGUMENT

1. The issue below was whether the Colorado Anti-Discrimination Act does apply, or can under the Constitution of the United States be applied, to the flight crew personnel of Continental Air Lines, Inc., an interstate air carrier. The Supreme Court of Colorado stated:

> "The only question resolved [by the trial court] was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment was based exclusively on that ground."

and thereafter approved and affirmed the holding of the trial court on this point, in addition to its affirmance of the trial court's holdings on the federal pre-emption and burden on commerce issues. One of the three bases of the decision below thus being on an independent non-federal ground, jurisdiction is lacking in this Court. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210.

2. Members of Continental's cockpit crews are, by the nature of their occupation, continuously and uniquely engaged in interstate commerce, and the application of diverse or inconsistent state and local regulations to such limited group constitutes an impermissible burden on commerce. In addition, the teaching of *Morgan v. Virginia*, 328 U.S. 373, and *Hall v. DeCuir*, 95 U.S. 485, that regulation of the racial practices of interstate carriers must be uniform is of even greater force when local regulation of such type is attempted to be applied to those who physically operate carriers, as distinguished from carrier passengers.

3. Federal regulation of certificated air carriers, both generally as to flight operations and specifically as to matters of racial discrimination, is so extensive as to occupy the field to the exclusion of local regulation. The Railway Labor Act prohibition against racial discrimination, initially held applicable to bargaining agents, has been applied as well to the employing carriers, *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, and affords protection to prospective employees as well as to personnel already employed. The Civil Aeronautics Act of 1938 (applicable when this action arose) and rules and regulations promulgated thereunder, constitute a comprehensive federal regulation controlling all phases of Continental's flight operations, including the standards and qualifications of its flight crew personnel. Moreover, § 404(b) of the Civil Aeronautics Act affirmatively prohibits carriers from discriminations of all kinds, including those based on race, and other sections of this statute establish remedial procedures for aggrieved persons. By these statutes Congress evidenced its recognition of the funda-

mental need for uniform national control of air carrier operations and its intent to exclude diverse or inconsistent state and local regulation.

ARGUMENT

I. This Court Lacks Jurisdiction Because the Supreme Court of Colorado Relied, inter alia, Upon an Independent and Adequate Non-Federal Ground as a Basis for its Decision.

Continental contends that the opinion of the Supreme Court of Colorado is not based solely on the Commerce Clause issues of pre-emption and burden on commerce. Continental submits that the decision of the Supreme Court of Colorado is that the Commission did not have jurisdiction in this matter for three reasons: first, the Colorado statute did not give the Commission jurisdiction over Continental's flight crew personnel; second, Congress has pre-empted this field; and third, if applied to Continental in this case the Colorado Act is an unconstitutional burden on commerce. Continental is aware that the Supreme Court of Colorado modified its initial opinion and will discuss that subject in more detail below. Notwithstanding that modification Continental submits that the independent non-federal ground remains as a basis for the decision of the Supreme Court of Colorado and consequently jurisdiction is lacking in this Court.

The trial court included a non-federal ground as a basis for its decision. That court held "that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce" when it enacted the 1957 Colorado Act (R. 260). It arrived at this con-

clusion after reviewing the 1957 Act and other pertinent Colorado statutes (R. 258-260). The trial court also held that the Act, to the extent applied to Continental's flight crew personnel, was invalid as creating a burden upon commerce and that Congress had pre-empted the area (R. 272-273, 285). The Supreme Court of Colorado clearly affirmed the trial court's decision on the pre-emption and burden grounds (R. 292, 294). However, the Supreme Court of Colorado in its opinion as it now stands interpreted the trial court's decision as resting on the state ground also, stating that:

> "The only question resolved was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment [of the trial court] was based exclusively on that ground." (R. 293).

In its original opinion the Supreme Court of Colorado stated, as the basis for the non-federal ground, the identical rationale of the trial court in practically identical language as follows:

> "This language [referring to 1953 C.R.S. § 80-24-2(5)] negatives the idea that there was any attempt on the part of the legislature to legislate upon a matter involving interstate commerce."

The Supreme Court of Colorado deleted this single sentence in its final opinion when the petitions for rehearing filed by Green and the Commission were denied. Otherwise the original opinion remains unchanged. In the opinion as it now stands the Supreme Court of Colorado sets forth with apparent approval earlier state laws recognizing federal jurisdiction and authority in the realm of

aeronautics (R. 290). Furthermore, the Supreme Court of Colorado not only affirmed the trial court's findings and conclusions without reservation, but proceeded to say:

> "The findings, conclusions and judgment of the the trial court might well be adopted in toto as the opinion of this court. However in the interest of brevity we will do no more than mention a few decisions which we think control the result." (R. 293).

Thus, the opinion of the court below, even as amended, still finds that the trial court determined the Act was inapplicable to employees of those engaged in interstate commerce, and continues to affirm the decision of the trial court and to approve all three bases of that decision (R. 293). These factors, Continental submits, are sufficient to show a non-federal ground for the decision below, fatal to jurisdiction in this court.

It is "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [Supreme Court] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210. See also *Murdock v. Memphis*, 20 Wall. 590, 636; *People ex rel. Doyle v. Atwell*, 261 U.S. 590, 592.

> "The reason [for the rule] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is

> to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-6.

This rule is so firmly established that it has been applied even when the state court adopts a construction of a state statute (state ground) on rehearing to avoid the conflict with the federal constitution (federal ground) which the court had found to exist in its original decision. *Quong Ham Wah Co. v. Industrial Accident Commission*, 255 U.S. 445. Petitioners cannot sustain the jurisdictional burden of demonstrating that this ground cannot account for the decision below. *Durley v. Mayo*, 351 U.S. 277, 281. Nor can it be argued that the state ground was arbitrary[2] and invoked as "a mere device to prevent a review of the decision upon the Federal question." *Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164. See also *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 455-458.

If, as construed by the courts below, the Colorado Act does not confer jurisdiction upon the Commission over Continental's flight crew personnel, this Court lacks jurisdiction because the construction to be placed upon a state statute is one of state, not federal, law. Since the decision below is based upon an adequate and independent state ground, it should not be reviewed.

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[2]It should be noted that the Colorado Act is a general statute and does not, in specific terms, purport to apply to the flight crew personnel of interstate air carriers. Therefore, an interpretation of that Act by the state court that it does not apply to such personnel is clearly permissible.

II. The Supreme Court of Colorado Correctly Held That Local Regulation of the Type Involved in This Case Is an Impermissible Burden on Commerce.

The general principles governing the distribution of power over interstate commerce and impermissible burdens on such commerce by state or local regulation are well established and not seriously disputed by petitioners. The power of Congress to regulate interstate commerce is supreme and plenary. The power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196. In the absence of federal legislation regulating a particular area of interstate commerce, the states may legislate on matters of overriding local concern if the state legislation does not interfere with the operation of such commerce. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299. However, "[i]t has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive" and the states may not act even in the absence of congressional action. *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U.S. 352, 399. Finally, the legitimate interests of the federal government and local governments will be balanced in a determination of the validity of local legislation as measured against the Commerce Clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761. In such a balancing of interests, among the most important factors to be considered are the type and nature of the interstate commerce involved and the degree of existing federal regulation of such commerce.

In measuring the validity of the state regulation asserted in this case, it will be useful first to point out what is not here involved. (1) The policy of the State of Colorado to prevent racial and religious discrimination in all its forms is of long standing.[3] (2) Neither the fact of the state policy nor the worth of its purpose is disputed by Continental. (3) The non-discriminatory employment policy embraced in the Colorado Act is wholly consistent with Continental's established personnel policy, which is that applicants for employment will be considered solely on the basis of fitness and ability to do the work (Pet. Ex. 9, R. 79, 178-179). (4) Continental has not challenged the authority of Colorado, under its police powers, to enact fair employment legislation, nor to apply such legislation to employees of interstate employers generally. (5) Continental has, and does, contend that the flight crew members who operate its interstate aircraft are a unique group, already subject to all-embracing federal control, whose regulation must be national in scope and uniform in application. Thus properly viewed, the issue is whether Colorado's interest in applying its statute to a limited group of pilots outweighs the national concern for uniform regulation of a class of professional employees having peculiarly national responsibilities.

In addition to the operating regulations of general application to air carriers, discussed *infra*, pp. 35-37, Congress has expressly recognized the singular responsibility

[3] Colorado's Equal Accommodation Statute, 1953 Colo. Rev. Stat. § 25-1-1 et seq., was first enacted in 1895. In **Colorado Anti-Discrimination Commission v. Case**, No. 19988, Colo. Sup. Ct., Dec. 17, 1962, the Colorado court, in sustaining the constitutionality of the Colorado Fair Housing Act of 1959, 1953 Colo. Rev. Stat. § 69-7-1 et seq. (1960 Perm. Supp.), said: "We hold that as an unenumerated inalienable right a man has the right to acquire one of the necessities of life, a home for himself and those dependent upon him, unfettered by discrimination against him on account of his race, creed or color."

of air carrier pilots by enacting legislation pertaining solely to such persons. These statutes, and implementing regulations, effectively subject commercial airline pilots to distinctive federal regulation and control of the greatest pervasiveness.

Under the Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), as amended, 49 U.S.C. §§ 401-722 (1952),[4] the Administrator is authorized to issue airman certificates for various aircraft positions to persons meeting prescribed qualifications (§ 602, 49 U.S.C. § 552 (1952)) and to designate specially pilots serving in scheduled air transportation (§ 602(c), 49 U.S.C. § 552(c) (1952)). Pursuant to the statutory grant, comprehensive regulations have been adopted prescribing and limiting the qualifications of pilots generally and airline pilots in particular. The requirements for a commercial pilot's license are contained in 14 C.F.R., Part 20, which establishes a minimum age (§ 20.40), physical standards (§ 20.42), examinations based on the principles of meteorology, navigation, safe flight operations and the civil air regulations (§ 20.43), minimum aeronautical experience (§ 20.44), and demonstrated aeronautical skills (§ 20.45). Additional requirements are imposed for aircraft class ratings (§§ 20.120-20.121-2) and instrument ratings (§§ 20.125-20.128-1). More stringent qualifications as to age, physical condition, aeronautical experience, knowledge and skill are required of candidates for an airline transport pilot rating (14 C.F.R., Part 21, § 21.1 et seq.), and it is necessary that the pilot in command of any commercial aircraft hold an airline transport

[4]The Civil Aeronautics Act of 1938 was replaced by the Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C. §§ 1301-1542 (1958). However, the instant case was commenced, and the acts upon which it is based occurred, in 1957 and hence the Civil Aeronautics Act of 1938 is the applicable statute here.

pilot rating (14 C.F.R., Part 40, § 40.300). Each air carrier is obligated to establish and maintain a training program for its flight crews, the general nature and minimum standards of such program being prescribed by the Administrator (§ 40.280 et seq.). The composition and qualifications of air carrier flight crews[5] are federally regulated (§ 40.261; § 40.300 et seq.) as are permissible flight times for airline crews (§ 40.320).

Continental submits that no other aspect of interstate commerce is subject to such broad and comprehensive federal regulation. Even the operating personnel of other interstate transportation companies are not subject to the degree of federal regulation applicable to flight crews of air carriers. By way of contrast, the federal government does not license the operators of interstate motor carriers (49 Stat. 543 (1935), as amended, 49 U.S.C. § 301 et seq. (1958)) or rail carriers (24 Stat. 379 (1887), as amended, 49 U.S.C. § 1 et seq. (1958)). Such licensing as may be deemed necessary is left to the states. The reason for this distinction is clear. No other group connected with interstate commerce has the awesome responsibilities of cockpit crews. No other group must possess such high qualifications, both mental and physical. No other group needs comparable training and experience. No other group operates the interstate carriers for "[a] way of travel which quickly escapes the bounds of local regulative competence [and therefore calls] for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled com-

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[5] 14 C.F.R., Part 40, Scheduled Interstate Air Carrier Certification and Operation Rules, § 40.5, Definitions. "Flight Crew Member. A flight crew member is a crew member assigned to duty on an airplane as a pilot or flight engineer."

merce of the past." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 107. In short, the cockpit crews of interstate air carriers "require a general system of uniformity of regulation" if any aspect of interstate commerce does. The holdings of this Court teach that certain fields do require a single uniform system and that in these fields the power of Congress is supreme and exclusive. *Minnesota Rate Cases*, 230 U.S. 352; *Southern Pacific Co. v. Arizona*, 325 U.S. 761.

Petitioners attempt to narrow the operative facts by stressing that Green is a mere applicant for employment and emphasizing Colorado's interest in the subject matter of this litigation.[6] This analysis overlooks the inevitable result of granting the relief sought by petitioners, namely, immediate cockpit crew status for Green. It is this crew status which the federal government has regulated and controlled to an extent unparalleled for any other group related to interstate commerce. Of even greater significance, the Colorado Act does not purport to cover only job applicants. By its terms, it operates in favor of *employees*—to their promotion, demotion and discharge (§ 80-24-6(2)). It prohibits discrimination in the rate of compensation to employees (§ 80-24-6(2)). The Colorado Commission may order the reinstatement or upgrading of employees (§ 80-24-7(12)). The Colorado Act does not concern itself solely or even primarily with job applicants. It purports to operate upon the whole employment relationship. It is this total employment relationship of the

[6]As a practical matter, Colorado's interest in this matter is minimal. Green, a resident of Michigan (R. 223), obtained a Continental employment application form in San Francisco (R. 35). While Continental's principal offices are presently located in Denver (they will be moved to Los Angeles in mid-1963), it is a Nevada corporation and the majority of its pilots were, at the time of the hearing before the Commission, domiciled in Texas (R. 109).

cockpit crews of interstate air carriers which is, and must be, subject to a single, uniform national rule.

This Court has held that non-federal regulation of interstate carriers with respect to racial matters is an impermissible burden on commerce. *Morgan v. Virginia*, 328 U.S. 373; *Hall v. DeCuir*, 95 U.S. 485. In *Hall* this Court unanimously held that a state statute which prohibited racial discrimination against passengers by an interstate carrier imposed an impermissible burden on commerce and hence was unconstitutional. In *Morgan* it was held that a state statute which required segregated passenger accommodations must fall for the same reason.

Petitioners attempt to avoid the *Hall-Morgan* doctrine by arguing that the state law invalidated in *Hall* prohibited discrimination against interstate passengers whereas the Colorado law, as petitioners would apply it, prohibits discrimination against interstate air carrier cockpit crew personnel. Continental submits that there is more reason to apply the *Hall-Morgan* doctrine to cockpit crews than to interstate bus or steamship passengers. The state statutes invalidated by this Court as burdens on commerce in *Hall* and *Morgan* required at most a shifting of passengers at a state line. The Colorado Act, and others like it, go far beyond and purport to regulate the entire employment relationship. Different substantive requirements, procedural requirements, and enforcement attitudes and methods are almost unlimited in number. Personnel on state commissions and on the staffs of such commissions will vary from year to year and from state to state. Only a hodgepodge of individual attitudes on policy, conciliation and enforcement can result. The law in State X today can be amended in all or any particulars tomorrow;

what may be uniform now, or at least not antagonistic, can be the subject of great diversity next year, depending upon the political complexion, social awareness, or economic attitudes of the various state legislatures. It is not idle to suggest that the scope and enforcement of a given state statute depends as much on the annual or biennial appropriation for the enforcing agency as any other factor, and no factor is subject to greater fluctuation by states or by years.

Moreover, the application of burdensome state legislation to interstate passengers, as in *Hall* and *Morgan*, can hardly be deemed of coordinate significance as applied to those persons who physically operate interstate carriers. If commerce is impeded by diversity of regulation with respect to passengers, the same regulation must create a substantially greater burden when it affects the carrier operator—in this case its pilot. Finally, the speed and complexity of modern air transportation, coupled with its regular, numerous and routine interstate contacts, renders the cockpit crews of air carriers much less subject to permissible diverse state and local regulation than could be applied with respect to the older and more leisurely forms of surface transportation involved in *Hall* and *Morgan*. Cf., *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. at 107.

The present record contains a dramatic illustration of the reason why regulation of air carrier flight crews must be lodged exclusively in the administrative tribunals created by Congress for this purpose. It is no reflection on the seven members of the Colorado Commission to note that they serve without compensation (1953 Colo. Rev. Stat. § 80-24-4 (1960 Perm. Supp.)) and that no one of

them has been represented as having special aptitude in evaluating pilot qualifications. Yet in the instant matter this doubtless well-intentioned group of lay citizens undertook to find, not just that Green was qualified to serve as a member of a flight crew, but that he was "*better* qualified" (emphasis supplied) than any other applicant interviewed (R. 225).[7] Such a finding presumably would not only have required Continental to employ Green, but to have employed him first among the six qualified applicants interviewed at the same time. And if the authority of the Commission to make qualitative pre-employment determinations in this highly specialized field is sustained, can it successfully be urged that the Commission could not make the same kind of evaluation in the case of a minority group pilot who is denied promotion, or is demoted, or discharged? Under the Colorado Act the authority of the Commission is the same in each instance. Surely the competence of the Commission to pass judgment upon the qualifications of a salesman, or an office worker, or a factory employee, is not co-extensive with its ability to rate an airline pilot. More significantly, an error of judgment by the Commission in the former cases has scarcely the same ramifications as in the case of pilot personnel.

Petitioners do not ask that *Hall* and *Morgan* be overruled. In fact, they specifically approve the side of the coin represented by *Morgan*. The principal attack by petitioners on the applicability of *Hall* to this case is twofold. First, it is argued that *Hall* is outside the mainstream of constitutional doctrine and has not received the

[7] Continental acknowledged that Green met the minimum qualifications for entry into its pilot training classes. He was so classified until his application was withdrawn after his involvement in multiple litigation became known. Contrary to the apparent basis for the Commission's finding, however, a pilot with the greatest number of flying hours is not necessarily the best qualified pilot (R. 99).

recent approval of this Court. Second, it is urged that changing constitutional doctrine has rendered the *Hall* decision unwise and it should not be applied to this case. Neither contention is sound.

In *Morgan* there were two attacks upon the constitutionality of the Virginia statute compelling racial segregation of interstate bus passengers. This Court rested its decision invalidating the statute upon the burden on commerce ground, and specifically upon the rule of *Hall* that such commerce must be free from the diverse racial regulations of the states. The "soundness of this Court's early conclusion in Hall v. DeCuir" was expressly affirmed. 328 U.S. at 383. This Court pointed out in *Morgan* that the state statute in *Hall* was invalidated "for reasons well stated in the words of Mr. Chief Justice Waite."[8] 328 U.S.

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[8]The language of Mr. Chief Justice Waite was then set forth as follows in a footnote on the **Morgan** opinion:

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if, on one side of a State line, his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board would be compelled to carry all, white and colored, in the same cabin during

at 383-384. Specifically, the Virginia statute in *Morgan* was invalidated because of "the need for national uniformity in the regulations for interstate travel." 328 U.S. at 386. Mr. Justice Frankfurter, concurring, also found *Hall* to be controlling:

> "My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me Hall v. DeCuir, 95 U.S. 485, 24 L. Ed. 547, is controlling. Since it was decided nearly seventy years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the Court.
>
> "The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably, whether such contradictory and confusing State laws concern racial commingling or racial segregation." 328 U.S. at 388.

It would be difficult to find a more express approval of a case than that which was accorded *Hall* in *Morgan*. Moreover, the continuing vitality of *Hall* was recognized by this Court as late as 1960,[9] subsequent to the cases petitioners rely upon as evidencing changed constitutional doctrine. On previous occasions this Court has often cited and relied to varying degrees upon *Hall*. See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 310;

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*(Continued)
his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color." 95 U.S. at 489.

[9] "But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. Hall v. DeCuir, 95 U.S. 485; . . ." **Huron Portland Cement Co. v. Detroit**, 362 U.S. 440, 444.

Minnesota Rate Cases, 230 U.S. 352, 401; *Cleveland, C. C. & S. L. Ry. v. Illinois*, 177 U.S. 514, 518, 522; *Western Union Telegraph Co. v. Pendleton*, 122 U.S. 347, 357. Other federal courts have relied upon the *Hall-Morgan* doctrine in recent years to invalidate as impermissible burdens on commerce various private rules and state and local regulations of interstate carriers with respect to racial matters. *Chance v. Lambeth*, 186 F.2d 879 (4th Cir. 1951), *cert. denied*, 341 U.S. 941; *Charles v. Norfolk & Western Railway Co.*, 188 F.2d 691 (7th Cir. 1951), *cert. denied*, 342 U.S. 831; *Whiteside v. Southern Bus Lines, Inc.*, 177 F.2d 949 (6th Cir. 1949); *Williams v. Carolina Coach Co.*, 111 F. Supp. 329 (E.D. Va. 1952), *aff'd*, 207 F.2d 408 (4th Cir. 1953); *Pryce v. Swedish-American Lines*, 30 F. Supp. 371 (S.D.N.Y. 1939).

Petitioners rely heavily upon *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, to discredit the *Hall* case. *Bob-Lo*, however, in no sense restricts the *Hall-Morgan* doctrine. If anything, it is one more recent instance of approval of that doctrine by this Court. Before holding that the Commerce Clause did not forbid a conviction under the Michigan Civil Rights Act for denying passage to a Negro on an excursion boat, this Court noted the "special local interest" in the commerce involved[10] and concluded that

[10]The factual situation in **Bob-Lo** was indeed unique and bears no relationship to interstate air commerce. A Negro was refused passage on an excursion boat which was operated by defendant company without intermediate stops between Detroit, Michigan, and Bois Blanc Island, a small island in the Detroit River about 15 miles from Detroit. Bois Blanc Island, which was almost entirely owned in fee by defendant and was used by it as an amusement park, was technically across the international boundary in Canada. However, there was no access to the island from Canada or in any other way than on defendant's excursion boats. Defendant's vessels carried no freight, mail, or express, and the only passengers were patrons going to the amusement park, who boarded ship at Detroit on round-trip one-day-limit tickets. The opinion does not indicate that defendant held a certificate of public convenience and necessity from any federal agency.

"[i]t would be hard to find a substantial business touching foreign soil of more highly local concern." 333 U.S. at 35. The *Hall-Morgan* doctrine was recognized and distinguished as follows:

> "The regulation of traffic along the Mississippi River, such as the Hall Case comprehended, and of interstate motor carriage of passengers by common carriers like that in the Morgan Case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here." 333 U.S. at 39-40.

Continental is not engaged in a highly localized business. Its Boeing 707 and 720B jet aircraft are flown from Los Angeles to Houston in less than three hours and from Kansas City to Chicago in an hour and five minutes. It would be difficult, if not impossible, to specify a job more completely or regularly interstate in nature than that of a flight crew member on a present day certificated air carrier.[11]

Nor is it sufficient to contend, as petitioners do here, that changing constitutional doctrine epitomized by *Brown v. Board of Education*, 347 U.S. 483, has rendered the *Hall* decision unwise and hence it should not be applied to this

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[11] **Railway Mail Association v. Corsi**, 326 U.S. 88, is inapposite. A state statute barring racial discrimination by a labor union was upheld against the contention that it violated the due process and equal protection clauses of the 14th Amendment and conflicted with the power of Congress to establish and regulate postal service. Application of the questioned statute was limited to ". . . a purely private organization deriving no financial or other statutory support or recognition from the federal government . . ." 326 U.S. at 96. Issues relating to interstate commerce were neither raised nor discussed nor decided.

case. It is argued from the rationale of *Brown*[12] that no state or locality would constitutionally be permitted to pass a law barring Negro cockpit personnel and therefore no direct conflict with the Colorado Act could arise. This is not the issue. There could be and is great diversity of regulation imposed by the various state anti-discrimination statutes. These differences encompass both procedure and substance, and range from the authorization of criminal penalties for discriminatory acts to no effective regulation at all. Some of the differences which now exist are set forth in Appendix A. Six of the eight states in which Continental operates have such statutes. In addition some cities served by Continental, or in which it has offices, have municipal ordinances and agencies purporting to regulate fair employment practices[13] either directly or through inclusion of non-discrimination clauses in contracts between the municipality and private employers.[14] Not only do differences now exist, but the statutes and ordinances (and the rules and regulations promulgated thereunder) are subject to modification, amendment and repeal by the political entities which enacted or promulgated them.

Lastly, it should be noted that the *Hall-Morgan*

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[12]Petitioners would apparently admit that the holding in **Brown** is in no way related to the constitutional issues involved in this case. **Brown** did not involve interstate or foreign commerce, the commerce clause of the Constitution, an assertion that state laws constituted an impermissible burden on interstate commerce, or an assertion that an attempt had been made to apply a state law in an area pre-empted by federal law.

[13]For example, prior to enactment by the California legislature of a statute having statewide application, the City and County of San Francisco had a comprehensive F.E.P.C. ordinance (Ordinance No. 10478, approved July 10, 1957, effective August 9, 1957).

[14]Municipal Code of Chicago, Chapter 198.7A; City of Chicago Commission on Human Relations, 211 West Wacker Drive, Chicago 6, Illinois.

doctrine does not stand alone as an example of impermissible state regulation of interstate commerce. This Court has precluded the application of state statutes to interstate transportation in many areas wholly unrelated to matters of race, and often in the complete absence of *any* federal regulation of the particular aspect of interstate commerce in question. The most recent pronouncement of this Court came in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, wherein it was held that a state statute requiring the use of a contour type of rear fender mudguard on interstate trucks was an impermissible burden on commerce, even though there was no federal regulation of such wheel flaps. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, this Court invalidated under the Commerce Clause the Arizona Train Limit Law which prescribed the maximum number of passenger and freight cars for trains operating in the state. In *South Covington Ry. Co. v. Covington*, 235 U.S. 537, 548, this Court relied expressly upon *Hall v. DeCuir* to invalidate as an impermissible burden on commerce a local ordinance regulating the maximum number of passengers per car and the minimum number of cars required for a street railway company operating between cities in two states. See also *Seaboard Air Line Railway Co. v. Blackwell*, 244 U.S. 310; *Kansas City Southern Ry. v. Kaw Valley Drainage District*, 233 U.S. 75; *Herndon v. Chicago, Rock Island & Pacific Ry.*, 218 U.S. 135; *St. Louis-San Francisco Ry. v. Public Service Commission*, 261 U.S. 369; *Missouri, K. & T. Ry. v. Texas*, 245 U.S. 484; *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404.

In the final analysis, the question is whether Colorado's interest in eliminating discrimination in the employer-employee relationship justifies the creation of an exception to the national policy of uniform regulation with

respect to flight crew personnel. It is not disputed that additional state anti-discrimination statutes are being passed yearly; the number of states having such laws is approaching 25; in the balance of the states such regulation does not exist. At present the air carrier and the Administrator under the Federal Aviation Act, both possessing a high degree of expertise in the field of air commerce, are charged with responsibility in the matter of pilot selection and qualifications. The effect of holding statutes of this type applicable to airline pilots is to vest an additional, non-technical agency with authority to pass judgment upon matters vital to air carrier operations. We respectfully submit that evaluation and control of the qualifications, skills and working conditions of airline flight crews is and must remain free of divergent local regulations, that the policy of both Colorado and the United States to eradicate discrimination based on race or religion is, as to this limited group, best fostered by the application of uniform national rules which, as demonstrated *infra*, are available, and that the Supreme Court of Colorado correctly held that the state regulation involved in this case constituted an impermissible burden on interstate commerce.

III. Pervasive Federal Legislation Precludes State Regulation of the Activity Involved in This Case.

Continental's constitutional attack on the attempted application of the Colorado Act to its flight crew personnel was and is twofold. It contended (a) that state regulation of its flight crews constituted an impermissible burden on commerce without regard to the nature or extent of federal regulation of the subject matter, and (b) that extensive

federal legislation so occupied the field as to exclude local regulatory action.

While the Supreme Court of Colorado expressly approved the trial court's finding and conclusion that the Act would unduly burden Continental's interstate operations, it also affirmed the lower court's holding that application of the Colorado Act to Continental's flight crews was barred by existing federal regulation of this field (R. 292-293). Continental asserts that the rulings of both courts below with respect to federal pre-emption are correct.

The foundation principles applicable to the doctrine of pre-emption are not in serious dispute. Where the subject matter is within the reach of Congress, federal legislation bars antagonistic local action, and if the area is one in which the federal power is paramount, Congress may expressly forbid state legislation. *M'Cullock v. Maryland*, 4 Wheat. 316; *Sinnot v. Davenport*, 22 How. 227.

Far more common are situations in which Congress has not specifically prohibited local action and there is no direct conflict between the federal statutory scheme and attempted state regulation. In each such case the inquiry must be whether Congress intended to sanction local regulation. *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 10. Guide lines for determining in a given case the permissible scope of state action have been recognized and applied by this Court on many occasions and the principal criteria are well established. The intent of Congress to regulate exclusively need not be expressly declared, *New York Central R. Co. v. Winfield*, 244 U.S. 147, but may be implied from the nature of the federal legislation and the subject matter involved. *Napier v. Atlantic Coast Line R.*

Co., 272 U.S. 605; *Bethlehem Steel Co. v. New York Lab. Rel. Bd.*, 330 U.S. 767, 772. Where the scheme of federal legislation is pervasive, it is proper to infer that Congress intended to exclude state action, *Pennsylvania v. Nelson*, 350 U.S. 497, 502; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230. A similar result will obtain where the federal interest in the activity is such that Congress will be assumed to have pre-empted state action, *Rice*, 331 U.S. at 230, *Nelson*, 350 U.S. at 504, and federal occupation will be found where the policies of local governments may produce a result inconsistent with federal regulation, *Rice*, 331 U.S. at 230, *Nelson*, 350 U.S. at 505. Where the subject matter involves a multi-state activity which cannot effectively be regulated by competing states, the states have been barred from regulation, *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 167, *Nelson*, 350 U.S. at 508-509, and the fact that local legislation may complement, rather than conflict with federal legislation, will not save the former, *Charleston and W. C. R. Co. v. Varnville Furniture Co.*, 237 U.S. 597[15]; *Missouri Pacific R. Co. v. Porter*, 273 U.S. 341; *H. P. Hood and Sons, Inc., v. DuMond*, 336 U. S. 525, 544; *Campbell v. Hussey*, 368 U.S. 297, 302.[16]

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[15]"When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." 237 U.S. at 604.

[16]The doctrine of federal pre-emption often has been applied to the regulation of labor relations in businesses affecting commerce, e.g., **Garner v. Teamsters**, 346 U.S. 485; **Weber v. Anheuser-Busch**, 348 U.S. 468; **Guss v. Utah Labor Relations Board**, 353 U.S. 1 (pre-emption found despite refusal of federal agency to act); **San Diego Building Trades Council v. Garmon**, 359 U.S. 236 (conduct potentially subject to federal regulation prevents assertion of state jurisdiction); cf., **Chas. Dowd Box Co. v. Courtney**, 368 U.S. 502; **Local 174 v. Lucas Flour Co.**, 369 U.S. 95; and **Smith v. Evening News Ass'n**, 83 S. Ct. 267 (1962), where § 301 of the Labor-Management Relations Act was held expressly to invest state courts with concurrent judicial jurisdiction in actions brought under that statutory provision, although requiring, in the interest of uniformity, that federal, rather than local law, be applied by the state courts when exercising such concurrent jurisdiction. **Local 174 v. Lucas Flour Co.**, **supra**.

An examination of the pertinent statutes discloses the all-encompassing scope of federal regulation of Continental's operations as an interstate carrier by air. Such regulation is divided into two major categories: (a) regulation with respect to economic matters, and (b) regulation of flight operations. The Civil Aeronautics Act, 52 Stat. 977 (1938), 49 U.S.C. §§ 401-722 (1952) (applicable to the facts of this case, as noted *supra*, fn. 4, but now superseded by the substantially similar Federal Aviation Act of 1958, 72 Stat. 737 (1958), 49 U.S.C. §§ 1301-1542 (1958)), governs virtually every facet of Continental's corporate activity and regulates in detail its various operations. The economic regulation of air carriers pursuant to that statute is comprehensive. For example, Continental may operate as an air carrier only upon issuance by the Civil Aeronautics Board (CAB) of an authorizing certificate (§ 401(a), 49 U.S.C. § 481(a) (1952)), the predicate for such certification being (a) Continental's ability properly to perform air transportation and (b) a finding that Continental's transportation services are required by the public convenience and necessity (§ 401(d)(1), 49 U.S.C. § 481(d)(1)(1952)). Transportation service may be furnished only to points specified in such certificate (§ 401(f), 49 U.S.C. § 481(f)(1952)), and no segment of Continental's certificated route may be abandoned without CAB approval (§ 401(k), 49 U.S.C. § 481(k)(1952)). Such certificate may be transferred only with CAB approval (§ 401(i), 49 U.S.C. § 481(i)(1952)), and is, after notice and hearing, subject to alteration, amendment, suspension or revocation at any time for intentional failure to comply with the provisions of the Act or any order, rule or regulation issued thereunder (§ 401(h), 49 U.S.C. § 481(h)(1952)). Continental must file, post and publish its tariffs, or any tariff

changes, which may be rejected (§ 403(a), 49 U.S.C. § 483(a)(1952)) or otherwise varied (§ 1002, 49 U.S.C. § 642 (1952)) by the CAB, and it may be required to transport United States mail at prescribed rates and pursuant to rules and regulations issued by the Postmaster General (§§ 401(m),(n), 405, 406, 49 U.S.C. §§ 481 (m),(n), 485, 486 (1952)). Continental may be required to make and file with the CAB regular or special reports on virtually any aspect of its activities (§ 407(a), 49 U.S.C. § 487(a) (1952)), must regularly report certain details of its stock ownership (§ 407(b),(c), 49 U.S.C. § 487(b),(c)(1952)), must maintain its business records in the manner and on the forms prescribed by the CAB, and is subject to CAB inspection and examination of its records, property and equipment at all times (§ 407(d),(e), 49 U.S.C. § 487(d), (e)(1952)). Any consolidation, merger or acquisition of control in another air carrier is carefully regulated and subject to CAB approval (§ 408, 49 U.S.C. § 488(1952)); and interlocking directorships and similar relationships are subject to Board scrutiny and control (§ 409, 49 U.S.C. § 489 (1952)). In addition, and pursuant to statutory mandate, supplementing administrative regulations from time to time have been promulgated in the field of air carrier economic regulation. See, in particular, 14 C.F.R., Parts 200-300.

Federal regulation of the flight operations of Continental and other interstate air carriers is even broader in scope. Continental's aircraft, its use of the airways, the qualifications and abilities of its pilots, and its relationship with its employees generally are subject to close and continuing federal control. The magnitude and detail of such federal regulation emphasizes the Congressional purpose

to promote a uniform, national system of commercial air operations unfettered by diverse or inconsistent local regulation.

The Civil Aeronautics Act imposes broad powers and duties upon the CAB to prescribe minimum standards for the design, construction, performance and maintenance of aircraft and aircraft components, to establish air traffic rules governing the flight of aircraft, and to establish such other rules, regulations and minimum standards as may be necessary to provide for safety in air commerce (§ 601, 49 U.S.C. § 551 (1952)). *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956) and *City of Newark v. Eastern Airlines, Inc.*, 159 F. Supp. 750 (D.N.J. 1958) are illustrative cases recognizing pervasive federal regulation under the Civil Aeronautics Act. The Act imposes upon air carriers the duty of obtaining an air carrier operating certificate which shall specify such terms, conditions and limitations as may be necessary to insure safe operation (§ 604, 49 U.S.C. § 554 (1952)), and makes unlawful any operation by a carrier in violation of its operating certificate (§ 610, 49 U.S.C. § 560 (1952)). Detailed rules and regulations have been adopted to implement the statutory provisions noted above. 14 C.F.R., Parts 1-60. Such rules and regulations govern virtually every aspect of Continental's flight operations.

The statutory provisions and Civil Air Regulations prescribing standards and qualifying conditions for airline pilots have been enumerated in some detail, *supra*, p. 20 and will not be repeated here. Such provisions evidence a Congressional recognition of the need for a uniform national regulatory scheme applicable to interstate air

carriers and their flight crews.[17] Judicial interpretation of these statutes has accorded them, and regulations issued thereunder, the broad application intended by Congress. *Carey v. CAB*, 275 F.2d 518 (1st Cir. 1960) (Lack of skill and judgment on a single flight justified revocation of pilot's airline transport rating); *Hard v. CAB*, 248 F.2d 761 (7th Cir. 1957), *cert. denied*, 355 U.S. 960 (Suspension of pilot's airline transport rating upheld on basis of single incident, even though no rule or regulation had been violated and there was no finding the pilot was not qualified); *Wilson v. CAB*, 244 F.2d 773 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 870 (Suspension of pilot's airman certificate affirmed despite absence of finding pilot not qualified); *Air Line Pilots Association, International v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (Administrative regulation prohibiting use on air carriers of pilots 60 years of age or over upheld); *Kent v. CAB*, 204 F.2d 263 (2d Cir. 1953), *cert. denied*, 346 U.S. 826 (Jurisdiction of CAB to make and enforce labor protective provisions in order approving acquisition of one air carrier by another, such enforcement to include displacement of seniority rights which had vested under pre-existing collective bargaining contracts, affirmed).

The issue in this suit is not, as asserted by petitioners, whether the Colorado Anti-Discrimination Act may in a general sense be applied to employers engaged in interstate commerce (Green's Brief, p.3), but rather, whether the Act may constitutionally be applied to the flight crew personnel of an interstate air carrier (R. 285, 293). Re-

[17]The pre-eminence of federal control of aviation was given statutory recognition by the State of Colorado in 1937 (1953 Colo. Rev. Stat. §§ 5-1-2, 5-1-3, and 5-1-8), a fact relied upon in this case by the Denver District Court (R. 258-259) and the Supreme Court of Colorado (R. 290).

gardless of the extent to which federal regulation may exist with regard to other forms of interstate carriage, or to interstate enterprises generally, it is abundantly clear that Congress has exercised such a close and continuing control over the flight crews of air carriers as to manifest an intent to occupy exclusively such regulatory field.[18]

In this case federal occupation is apparent from the over-all scope and purpose of the Civil Aeronautics Act. In addition, however, the Railway Labor Act and particular provisions in the Civil Aeronautics Act deal specifically with the question of racial discrimination.

The stated purposes of the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-188 (1958), are (1) to avoid any interruption to commerce or to the operations of any carrier engaged in commerce; (2) to prevent any limitation on the freedom of association among employees or their right to join a labor organization; (3) to provide complete independence for carriers and their employees in the matter of self-organization to carry out the purposes of the act; (4) to provide for the prompt settlement of disputes relating to rates of pay, rules and working conditions, and (5) disputes arising out of grievances or the interpretation or application of agreements entered into under the Act (§ 2, 45 U.S.C. § 151(a) (1958)). Carriers subject to the Act and their employees have a mandatory duty to make and maintain agreements

[18]Mr. Justice Jackson's statement in his concurring opinion in **Northwest Airlines, Inc. v. State of Minnesota**, 322 U.S. 292, 303, is apropos:

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certificated personnel and under an intricate system of federal commands."

with respect to rates of pay, rules, and working conditions and to adjust all disputes connected therewith (§ 2, First, 45 U.S.C. § 152, First (1958)), and elaborate procedures are established regulating the relationship between a carrier and its employees.

It is significant that no express language in the Railway Labor Act refers to racial discrimination by either carriers, employees, or representatives of employees. Notwithstanding the absence of explicit statutory direction, this Court, in a series of landmark decisions, held that the bargaining representative of a class or craft of carrier employees was bound to represent fairly all employees in that class or craft without discrimination based on race. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232. The Court found, in the language and purposes of the Railway Labor Act, an intention by Congress to prohibit invidious racial distinctions. The rationale of these cases is that the bargaining representative, having derived its authority from the statute and acting pursuant to certification from the National Mediation Board, an agency of the federal government, was subject to limitations akin to those applicable to government agencies.

The same rationale is applicable to the racial practices of carriers. As demonstrated above, air carriers derive their rights, privileges and duties from federal statutes, are operated pursuant to federal certification, and are regulated in every material respect by federal officers. If labor organizations representing carrier employees are required, by virtue of their statutory sponsorship, to avoid discrimination based on race in their practices, no lesser

obligation can or should be found with respect to carriers. Cf. *Baldwin v. Morgan*, 287 F.2d 750, 755(5th Cir. 1961). Indeed, this Court has indicated that the true scope of the non-discrimination doctrine enunciated in *Steele* and *Tunstall* extends substantially beyond the narrow construction ascribed to those cases by petitioners. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, concerned racial discrimination directed, not against members of the class or craft represented by the union, but against a separately represented class of employees. It was held that racial discrimination by a Railway Labor Act bargaining representative, whether directed against members of the represented class or another class, was barred. Of greater significance in the instant case was this Court's direction to the district court, on remand, to enjoin *the carrier* as well as the labor organization from using the collective bargaining contract or any other similar discriminatory device to eliminate the jobs of Negro porters. 343 U.S. at 775. It seems clear on principle that if, as in *Howard*, a carrier is barred by the Railway Labor Act from discrimination against its Negro employees in concert with a labor organization, the same conduct would not be insulated from the reach of the statute simply because the carrier acted unilaterally. See, *Richardson v. Texas and New Orleans R. Co.*, 242 F.2d 230 (5th Cir. 1957).

Petitioners urge, however, that federal pre-emption with respect to racial discrimination by an air carrier, at least as raised in this case, is not disclosed by the Railway Labor Act because the ambit of that statute does not reach applicants for employment, as distinguished from employees. On the contrary, the Railway Labor Act does in fact extend to the employment of new personnel as well as relationships with persons already employed and their

bargaining agents. It prohibits "yellow dog" contracts as a condition of employment (§ 2, Fifth, 45 U.S.C. § 152, Fifth (1958)). It prohibits carriers from influencing, coercing, or interfering with employees in the choice of their bargaining representatives (§ 2, Third, 45 U.S.C. § 152, Third (1958)). A well-known device to effect such coercion is to hire only non-union personnel. Anti-union discrimination in hiring practices is thus effectively proscribed. The Railway Labor Act, therefore, clearly applies to hiring practices of air carriers, and in performing their rights and duties in this area, such carriers, under *Howard*, cannot discriminate on account of race.

Moreover, petitioners' contention ignores the fact that the Colorado Act is not limited in its scope to applicants for employment, but is intended to have continuous application throughout the employment relationship. By purporting to regulate discrimination in hiring, promotion (as in *Steele, Tunstall* and *Graham*), demotion (as in *Steele, Tunstall and Graham*), discharge (as in *Howard*), and compensation (as in *Steele, Tunstall* and *Graham*), 1953 Colo. Rev. Stat. § 80-24-6(2) (1960 Perm. Supp.), the Colorado Act intrudes into areas indisputably subject to provisions of the Railway Labor Act. There is no rational basis for such diversity of regulation. A carrier has a duty imposed by statute to make and maintain agreements with representatives of its employees. It is forbidden, on pain of damages, in addition to equitable relief, from entering into or participating in the enforcement of discriminatory agreements. If the Railway Labor Act bars a carrier from discriminating on the basis of race against its employees in matters of promotion, demotion, discharge or seniority rights, whether singly or in collusion with or coerced by a bargaining representative, such bar must

extend to applicants as well as employees. Any other result would largely nullify the protection from racial bias that Congress intended the Railway Labor Act to confer. See, *Central of Georgia R. Co. v. Jones*, 229 F.2d 648 (5th Cir. 1956), *cert. denied*, 352 U.S. 848; *Richardson v. Texas and New Orleans R. Co.*, 242 F.2d 230 (5th Cir. 1957).

The Congressional intent to pre-empt the field of regulation with respect to air carrier flight crews is even more readily discerned in the Civil Aeronautics Act, which contains an express prohibition against discrimination of all kinds and a statutory remedy for aggrieved persons.[19] That statute's declaration of policy, 52 Stat. 980 (1938), 49 U.S.C. § 402 (1952), requires the Civil Aeronautics Board to consider, as being in the public interest:

> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;"

and § 404(b) of the C.A.A., 52 Stat. 993 (1938), 49 U.S.C. § 484 (b) (1952), affirmatively bans an air carrier from unjust discrimination or unreasonable prejudice "in any respect whatsoever."[20] A substantially identical statute[21]

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[19]Nor does § 1106 of the Civil Aeronautics Act, 52 Stat. 1027 (1938), 49 U.S.C. § 676 (1952), alter the above result. That clause merely preserves **existing remedies**, in the sense of pre-existing remedies. See **Mack v. Eastern Air Lines**, 87 F. Supp. 113, 115 (D. Mass. 1949). As all the incidents giving rise to the present litigation took place in 1957, the applicable statute is the Civil Aeronautics Act of 1938. The Colorado Anti-Discrimination Act not having been passed until 1957, that statute was not a "now existing remedy" within the meaning of § 1106 when the 1938 Act was passed and therefore cannot be used to supplement the federal legislation.

[20]Section 404(b) of the Civil Aeronautics Act (52 Stat. 993 (1938), 49 U.S.C. § 484(b)(1952) provides:

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation

was held in *Mitchell v. U. S.*, 313 U.S. 80, to forbid discrimination based on race in the accommodations made available to interstate rail passengers. *Henderson v. U. S.*, 339 U.S. 816, held that § 3(1) of the Interstate Commerce Act prohibited segregated dining facilities on interstate trains. *Boynton v. Virginia*, 364 U.S. 454, involved similar statutory language applicable to interstate motor carriers.[22] A Negro interstate bus passenger refused to leave the portion of a bus terminal dining room reserved for white persons. His state court conviction was set aside because of the anti-discrimination provisions of §216(d), notwithstanding that the bus company neither owned nor directly controlled the terminal restaurant.

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[20] (Continued)
in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[21] Section 3(1) of the Interstate Commerce Act (54 Stat. 902 (1940), 49 U.S.C. § 3(1) (1958)), which provided:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

[22] Section 216(d) of Part II, Interstate Commerce Act (54 Stat. 924 (1940), 49 U.S.C. § 316 (d) (1958)) provides in part as follows:

". . . It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, that this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

As the foregoing and related cases recognize, one of the purposes of § 3(1) and § 216(d) of the Interstate Commerce Act is to prohibit racial discrimination by interstate rail and motor vehicle carriers. The same beneficent purpose must be accorded similar language contained in § 404(b) of the Civil Aeronautics Act.[23] Although the precise issue has not been presented to this Court, the Court of Appeals for the Second Circuit, in *Fitzgerald v. Pan American Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956), had no hesitation in construing § 404(b) as prohibiting racial discrimination by an air carrier and as creating an independent federal right of action in favor of persons aggrieved thereunder.

In determining whether local regulation may stand in a field in which there has been extensive and expanding federal activity, it is pertinent to inquire whether a federal remedy is available to aggrieved persons. *Fitzgerald v. Pan American Airways, Inc., supra*, held that redress in damages may, in appropriate cases, be claimed for violation of § 404(b). There is, however, a statutory procedure under which equally effective remedies may be fashioned in cases of the type here under consideration.[24]

Section 1002 of the Civil Aeronautics Act (49 U.S.C. § 642 (1952)) permits any person, believing the Act to have been violated, to file a complaint with the Civil Aero-

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[23] It is noteworthy that the Department of Justice and certain of the amici curiae have declined to take a position on the issue of whether § 404(b) prohibits air carriers from racial discrimination in matters of employment.

[24] In discussing various available remedies under federal law, Continental in no sense admits discrimination against Green on account of his race. Its comments here are directed solely to the issue of whether local regulation of the subject matter of this case is permissible.

nautics Board. The CAB may also, on its own motion, initiate investigations of suspected violations (§ 1002(b), 49 U.S.C. § 642(b)(1952)). If, after notice and hearing, the CAB determines that any provision or requirement of the Act has been violated, it may issue an order requiring compliance (§ 1002(c), 49 U.S.C. § 642(c)(1952)). A procedure for conducting hearings before either the CAB or duly designated hearing examiners, compelling the attendance of witnesses, and the production of documents is provided (§§ 1004, 1005, 49 U.S.C. §§ 644, 645 (1952)), as is judicial review of orders issued by the Board (§ 1006, 49 U.S.C. § 646 (1952)).[25] Section 1007 (49 U.S.C. § 647 (1952)) rounds out the statutory plan by authorizing the CAB or, upon the Civil Aeronautics Board's request and under the direction of the Attorney General, the various United States attorneys, to prosecute actions in the district courts of the United States for the enforcement of the Civil Aeronautics Act.

Increasing use has been made of the counterpart of § 1007 in the Federal Aviation Act of 1958 (§ 1007, 72 Stat. 796 (1958), 49 U.S.C. § 1487 (1958)) to enforce the non-discrimination provisions of § 404(b) (now 72 Stat. 760 (1958), 49 U.S.C. § 1374(b) (1958)).[26] In *U. S. v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962) the Attorney General of the United States, at the request of the CAB and pursuant to § 1007 of the Federal Aviation Act of 1958, commenced an action directed against segre-

[25]The Civil Aeronautics Board has been recognized as having wide latitude in fashioning appropriate remedial orders. **Las Vegas Hacienda, Inc., v. Civil Aeronautics Board**, 298 F.2d 430, 439 (9th Cir. 1962), **cert. denied**, 369 U.S. 885.

[26]See **Wills v. Trans World Air Lines, Inc.**, 200 F. Supp. 360 (S.D. Cal. 1961) as an example of the broad remedial scope which has been accorded § 404(b).

gated terminal facilities at the Montgomery airport. The district court held that maintenance of segregated restaurant and other facilities at the air terminal violated both § 404(b) and Article I, § 8 of the United States Constitution. Substantially similar actions have been successfully maintained by the Department of Justice, in each instance at the request of the CAB and the Administrator of the Federal Aviation Act, in *U. S. v. City of Birmingham*, (Civil No. 10196, M.D. Ala., S.D., findings of fact, conclusions of law and judgment entered July 31, 1962, unreported) and *U. S. v. City of Shreveport*, (Civil No. 8888, W. D. La., findings of fact, conclusions of law and decree entered November 2, 1962, notice of appeal filed November 16, 1962, unreported). The significance of these cases, in the present context, is the recognition that racial discrimination in or related to air carriers is barred by § 404(b) and that, in addition to private individuals, the United States may bring an independent action for violation of this statute.

It will thus be seen that under both the Railway Labor Act, as construed by this Court, and the Civil Aeronautics Act, by specific statutory direction, racial discrimination by air carriers has been subjected to extensive federal control. Moreover, discrimination of this type is not only federally regulated but federal remedies of great breadth are provided. As has been shown, federal regulation and control permeates all phases of the business of an air carrier. The intention of Congress to require a consistent and uniform development of air commerce in all its aspects is manifested by the sweep of its regulatory commands.

The fact that the Colorado statute purports, in gen-

eral terms, to regulate in a manner sympathetic to the national policy on racial discrimination is not a valid reason for carving an exception to the paramount national policy requiring uniform regulation and control of flight crews engaged in interstate air commerce. This is particularly true where, as here, the national policy applicable to air carriers, as enacted by Congress and interpreted by the courts, would afford relief to a person who claims and can establish that he has been discriminated against because of his race.

CONCLUSION

Continental submits that this Court should hold that it does not have jurisdiction in view of the independent non-federal basis for the decision of the court below or, in the alternative, that the decision of the Supreme Court of Colorado was correct and should be affirmed.

Respectfully submitted,

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APPENDIX A

Comparison of Some of the Differences Between the Various State Laws Affecting Discrimination in Employment[1]

I. *Basic Types of State Acts*

There are at least four basic types of state laws affecting discrimination in employment. The statutes may be grouped broadly as follows:

(a) Statutes which provide for an administrative hearing and judicial enforcement of orders of an administrative agency or official. States in this class are *Alaska, California, Colorado, Connecticut, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin.*

(b) Statutes which do not provide for any type of administrative agency or enforcement of orders, but provide that violation of the statute shall constitute a misdemeanor. States in this class are *Delaware* and *Idaho.*

(c) Statutes which are strictly voluntary and have no enforcement provisions, civil or penal. States in this class are *Indiana, Nevada* and *West Virginia.*

(d) Statutes which apply only to a narrowly limited group of employers and do not establish any type of administrative agency. The *Arizona* statute applies only to public employers and to contractors performing work

[1]The statutory references to the various state laws affecting discrimination in employment are set forth in **Appendix B, infra.**

under a contract with a public employer. The *Nebraska* statute applies only to employers engaged in the production, manufacture or distribution of naval or military equipment or supplies for the State of Nebraska or the United States. *Nevada* has, in addition to the voluntary statute referred to in (c) above, a separate statute which applies only to public contractors performing work which is to be paid from public funds.

II. *Presence or Absence of a Separate Commission*

Many of the states have established separate commissions to administer their statutes affecting discrimination in employment. However, other states have different arrangements. For example, in *Alaska* the Commissioner of Labor administers the state statute. In *Idaho*, where the statute provides only that its violation is a misdemeanor, no specific duties are imposed on any public official. In *New Jersey*, most of the statutory duties, including the power to hold hearings and issue orders, are vested in the State Commissioner of Education. In *Oregon*, the Commissioner of the Bureau of Labor administers the statute. In *Wisconsin*, the statute is administered by the State Industrial Commission, although there is a seven-member Advisory Committee. The *Arizona* and *Nebraska* statutes applicable only to certain classes of public works contractors do not vest any specific duties in any public official.

III. *Who May File Complaints*

In nearly all states which have a commission-type statute complaints may be filed by any person claiming to be aggrieved by an unlawful discriminatory practice. However, in *Rhode Island* only the Commission can issue

a complaint, following a *charge* to the Commission by an aggrieved person or a civil liberties organization or after a preliminary investigation on the Commission's own initiative. Likewise, in *Ohio* only the Commission issues a complaint, following a charge by an aggrieved person or a preliminary examination by the Commission on its own initiative.

(a) The following states permit complaints only by persons claiming to be aggrieved: *Alaska, Illinois, Michigan* and *Minnesota.*

(b) The following states permit complaints by either an aggrieved person or the state Attorney-General: *California, Kansas, Missouri* and *Oregon.*

(c) The following states permit complaints by the aggrieved person and others as noted:

(1) *Colorado*—Attorney General, the Commission and a Commissioner.

(2) *Connecticut*—The Commission.

(3) *Massachusetts*—Attorney General and the Commission.

(4) *New Jersey*—Attorney General, Commissioner of Labor and Industry, and Commissioner of Education.

(5) *New Mexico*—Attorney General and the Industrial Commissioner.

(6) *New York*—Attorney General and the Industrial Commissioner.

(7) *Pennsylvania*—Attorney General and the Commission.

(8) *Washington*—The State Board Against Discrimination.

(d) In addition, most of the states permit complaints by employers requesting assistance by conciliation or other remedial action upon allegations that their employees, or some of them, refuse or threaten to refuse to cooperate or comply with the provisions of the statute. States in this class are *Alaska, California, Colorado, Connecticut, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Oregon, Pennsylvania* and *Washington*. In *Colorado* and *Minnesota* labor unions may also file complaints upon similar allegations against their members, or some of them.

IV. *What Practices are Prohibited*

The statutes generally contain prohibitions against discrimination based on race, color, religious creed and national origin, although the specific language used varies.

The following statutes also prohibit discrimination based on age: *Connecticut, Delaware, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Washington* and *Wisconsin*.

The *New Jersey* statute also prohibits discrimination based on eligibility for service in the armed forces of the United States.

The *Wisconsin* statute also prohibits discrimination based on sex. The *Nevada* statute applicable only to public works contractors also prohibits discrimination based on sex.

V. *Statutes of Limitations*

The state statutes vary widely with respect to the statute of limitations applicable to complaints of discriminatory conduct.

The statutes of *Alaska, Idaho, New Mexico, Oregon* and *Wisconsin* have no specific limitation period. Presumably, other provisions of state law govern or complaints may be filed without regard to a limitation period.

In *California* and *Rhode Island* the statute of limitations is one year. In *Colorado, Kansas, Massachusetts, Minnesota, Ohio* and *Washington* the limitation period is 6 months. In *Illinois* it is 120 days. In *Connecticut, Delaware, Michigan, Missouri, New Jersey* and *Pennsylvania* it is 90 days. In *New York* the limitation period is 90 days for complaints by persons claiming to be aggrieved but 6 months for complaints by the Attorney-General or the Industrial Commissioner.

VI. *Definitions of Employers*

Most statutes require that a minimum number of employees be employed before a private employer will be classified subject to the act. *Illinois* requires a minimum of 75 employees (50 after December 31, 1964), *Missouri* requires a minimum of 50, *Pennsylvania* requires 12, *Kansas, Michigan, Minnesota* and *Washington* require 8, *Colorado, Massachusetts, New Jersey, New York* and *Oregon* require 6, *California* and *Connecticut* require 5, *New Mexico, Ohio* and *Rhode Island* require 4. *Alaska, Indiana* and *Wisconsin* do not require any minimum number of employees.

Definitions of employees to be considered in determining whether an employer is subject to the statute also vary. Some states require that the employees work within the state. For example, *Illinois* and *Missouri* require that the 75 and 50 employees, respectively, be employed "within the State."

VII. *Required Qualifications of Commission Members*

None of the state statutes which establish separate commissions require any affirmative qualifications for members of the various commissions, except that *Minnesota* requires one of its commission of up to 9 members to be an attorney. No educational or experience standards are imposed by the statutes of any other state.

No requirements of any kind for commission members exist in *California, Connecticut, Massachusetts, New Jersey, New York, Rhode Island* and *Washington.* The following states impose a limitation on the maximum number of members which may belong to the same political party: *Colorado, Illinois, Indiana, Michigan, Ohio, Pennsylvania* and *West Virginia.* The following states provide for certain geographical or Congressional district representation on the Commission: *Colorado, Minnesota* and *West Virginia. Kansas* and *Wisconsin* (for its Advisory Committee) provide that a certain number of members shall represent industry and labor, respectively. *Illinois* requires that members have been residents of the state for 5 years. Two members of the *New Mexico* Commission are ex-officio members based upon their other positions (Attorney-General and Commissioner of Labor) in the state government. *Nevada* and *West Virginia* state that the members of the Commission represent the racial, religious and ethnic groups residing in the state.

VIII. *Compensation of Commission Members*

Many of the statutes specifically provide that the members of the commissions are to serve without compensation. States in this group include *Colorado, Illinois, Nevada, New Jersey, New Mexico* and *West Virginia.*

Yearly salaries are paid to the members of the Commission in some states. For example, in *Massachusetts* the Commission chairman receives $6,000 per year and the other two members $5,000 per year; in *Ohio* the members receive $5,000 per annum; in *Rhode Island* the members receive a salary of not more than $2,500 per year.

Several states give per diem pay for time actually spent by the commissioners in the performance of their duties. The *California* statute provides $50 per day; *Connecticut, Indiana, Michigan* and *Minnesota* (for Board of Review members) provide $25 per day; *Washington* provides $20 per day; and *Kansas* and *Pennsylvania* provide $15 per day.

IX. *Number of Commission Members*

The number of members of the various Commissions varies from a high of 11 in *Pennsylvania* to a low of 3 in *Massachusetts.* The number of members in some of the other states is as follows: *Connecticut*—10; *West Virginia*—9; *Minnesota*—up to 9; *Colorado, New Jersey* and *New York*—7; *Michigan*—6; *California, Illinois, Indiana, Kansas, Nevada, New Mexico, Ohio, Rhode Island* and *Washington*—5.

X. *Admissibility of Information Received During Conciliation Attempts*

Most of the statutes provide that efforts to eliminate alleged discriminatory practices by persuasion and conciliation shall precede a formal hearing. Future use of information secured during such efforts is subject to varying rules.

Some statutes specifically provide that endeavors at conciliation shall not be received in evidence at the hearing. States in this class include *California, Connecticut, Kansas, Massachusetts, Minnesota, Missouri, New Mexico, New York, Rhode Island* and *Wisconsin.*

The statutes of *Alaska, Oregon,* and *Wisconsin* contain no limitations upon the use of information secured during efforts at conciliation and presumably such information would be admissible at the formal hearing.

Other state statutes do not specifically provide that endeavors at conciliation shall not be admissible, but they do require that information as to what transpired during conciliation endeavors shall not be disclosed, or shall be disclosed only under prescribed conditions or subject to prescribed limitations. States in this class include *Colorado, Illinois, Michigan, New Jersey, Ohio* and *Pennsylvania.*

XI. *Type of Orders Permitted*

As noted previously, the statutes of *Arizona, Delaware, Idaho, Indiana, Nebraska, Nevada* and *West Virginia* do not contemplate administrative orders.

Most of the other state statutes authorize any orders necessary to effectuate the purposes of the various acts, although the specific statutory language pertaining to orders varies. However, the statutes of *Alaska* and *Oregon* provide for cease and desist orders only.

XII. *Penal Sanctions*

As noted previously, the *exclusive* sanction under the statutes of *Delaware* and *Idaho* is to classify violations of the act as misdemeanors.

A number of the other states provide exclusively for enforcement of administrative orders, including contempt proceedings for violation of a judicial order of enforcement.

A third category of states provides for enforcement of administrative orders *plus* criminal sanctions for willful violation of a commission order. States in this category include *Alaska*, *California*, *Massachusetts*, *Missouri*, *New Jersey*, *New York*, *Oregon*, *Pennsylvania* and *Washington*.

Finally, in those states which have statutes applicable only to certain groups of public works contractors, *Arizona* provides that violation of the statute shall be deemed a breach of the public works contract and a misdemeanor, *Nebraska* provides that violation shall be a misdemeanor, and *Nevada* provides that violation shall be a breach of the contract.

XIII. *Judicial Review*

The provisions for judicial review and enforcement of commission orders vary widely from state to state. In some states, such review is conducted in accordance with other provisions of state law governing administrative procedure and review. The time periods for seeking review or enforcement vary; in some states, review proceedings operate to stay the Commission's order, in other states they do not; the provisions vary concerning the right to introduce additional evidence at the judicial review level.

One of the most notable contrasts is that several states provide for a trial *de novo* at the judicial review level. States in this category include *Alaska, Missouri* and *New Mexico.* In *Missouri* any party to the court proceeding is entitled to a trial of the issues by a jury.

APPENDIX B

State Laws Affecting Discrimination in Employment

ALASKA	Alaska Comp. L. Ann. §§ 43-5-1 through 43-5-10 (1958 Cum. Supp.)
ARIZONA	Ariz. Rev. Stat. §§ 23-371 through 23-375 (1956)
CALIFORNIA	Ann. Calif. Codes, Labor Code §§ 1410 through 1432 (West, 1962 Cum. Supp.)
COLORADO	1953 Colo. Rev. Stat., §§ 80-24-1 through 80-24-8 (1960 Perm. Supp.)
CONNECTICUT	Conn. Gen. Stat. Ann., 1958, §§ 31-122 through 31-128
DELAWARE	Del. Code Ann., ch. 7, subch. II, §§ 710 through 713 (1960 Supp.)
IDAHO	Idaho Gen. L. Ann., ch. 73, §§ 18-7301 through 18-7303 (1961 Supp.)
ILLINOIS	Ill. Ann. Stat., ch. 48, §§ 851 through 866 (Smith-Hurd, 1962 Cum. Supp.)
INDIANA	Ann. Stat. Ind. §§ 40-2307 through 40-2317 (Burns, 1962 Supp.)
KANSAS	Gen. Stat. Kan. §§ 44-1001 through 44-1014 (1961 Supp.)
MASSACHUSETTS	Mass. Gen. L. Ann., 1958, ch. 151B, §§ 1 through 10 (1962 Cum. Supp.)
MICHIGAN	Mich. Stat. Ann. §§ 17.458(1) through 17. 458(11) (1960)

MINNESOTA	Minn. Stat. Ann. §§ 363.01 through 363.13, as amended by L. 1961, ch. 428
MISSOURI	Mo. Ann. Stat. §§ 296.010 through 296.070 (Vernon, 1962 Cum. Supp.)
NEBRASKA	Neb. Rev. Stat. §§ 48-215 through 48-216 (1960)
NEVADA	Nev. L. 1961, ch. 364; Nev. Rev. Stat. § 338.125 (1959)
NEW JERSEY	N.J. Stat. Ann. §§ 18:25-1 through 18:25-28 (West, 1962 Cum. Supp.)
NEW MEXICO	N. Mex. Stat. Ann. §§ 59-4-1 through 59-4-14 (1960 Replacement)
NEW YORK	N. Y. Executive Law §§ 290 through 301
OHIO	Ohio Rev. Code Ann. §§ 4112.01 through 4112.08 and 4112.99 (Page, 1962 Supp.)
OREGON	Ore. Rev Stat. §§ 659.010 through 659.115 and 659.990 (1959-60 Supp.)
PENNSYLVANIA	Pa. Stat. Ann., tit. 43 §§ 951 through 963 (Purdon, 1961 Cum. Supp.)
RHODE ISLAND	R. I. Gen. L. Ann. §§ 28-5-1 through 28-5-39 (1956)
WASHINGTON	Rev. Code Wash. §§ 49.60.010 through 49.60.320 (1962)
WEST VIRGINIA	W. Va. Code, 1961, §§ 265(156) through 265(161)
WISCONSIN	Wisc. Stat. Ann., 1957, §§ 111.31 through 111.37 (West, 1962 Supp.)